FOR ARGUMENT

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Nos. 01-653 and 01-657

In the
SUPREME COURT OF THE UNITED STATES
October Term 2002

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL., *Respondents*

ARCTIC SLOPE REGIONAL CORPORATION, ET AL., *Petitioners*

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF KATHRYN R. HEIDT *AMICUS CURIAE*

This Brief is Filed with the Consent of the Parties
Party Supported: Respondent

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INTEREST OF *AMICUS CURIAE*

Kathryn R. Heidt is a law professor at the University of Pittsburgh School of Law in Pittsburgh, Pennsylvania and is the incoming Chair of the American Bar Association's Business Bankruptcy Committee.* She has also taught as a visiting professor at the University of Pennsylvania School of Law and at New York Law School. She teaches courses in bankruptcy law, contracts, commercial law, corporate reorganizations, and negotiations of commercial and business transactions. She has written extensively on bankruptcy law. She is the author of the treatise ENVIRONMENTAL OBLIGATIONS IN BANKRUPTCY (1993) along with its annual supplements through 2001. She has written over a dozen law review articles on the subject of bankruptcy and commercial law. She speaks regularly to judges, practicing lawyers and law professors on these subjects.

Professor Heidt intends to bring to these proceedings perspectives that are broader than those which may be brought to the attention of the Court by the parties. These perspectives take into account additional interests to those advocated by the parties. Specifically, Professor Heidt considers the effect that a ruling in this case will have on a number of different interests in a Chapter 11 case involving a governmental regulatory action. Such interests include those of creditors (both secured and unsecured, consensual and non-consensual) reorganizing debtors, shareholders, employees, taxpayers and the communities in which the debtor operates. She considers the practical, conceptual and theoretical problems involved whenever a governmental unit (in this case the United States Federal Communications Commission, "FCC") attempts to exempt itself from the bankruptcy process. She is concerned that exempting the FCC from the bankruptcy process will profoundly and adversely affect the ability of future debtors having a governmental unit as a creditor to reorganize. This, in turn, will reduce substantially the recovery for creditors and shareholders, and have a negative impact on employees, local communities and other interested parties.

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*No part of this brief represents the views of the University of Pittsburgh School of Law, the University of Pittsburgh, or of the American Bar Association. No counsel for any party to the action authored this brief in whole or in part. No person, other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Court of Appeals for the District Court Circuit correctly held that the Federal Communications Commission ("FCC") could not cancel and resell licenses, which it previously sold to NextWave. First, allowing the FCC to revoke the licenses will have profound effects in all bankruptcies in which a governmental unit has issued a license, grant, permit or similar right. These effects conflict with the fundamental bankruptcy goals of debtor rehabilitation, fairness, efficiency, and maximization of recovery for creditors and others. These effects include: (1) undermining the goal of the fresh start and debtor rehabilitation by making it impossible for a company to rehabilitate itself to the detriment of creditors, shareholders, employees, the local community and others; (2) violating the principle of fairness or equality – that similarly situated creditors be treated equally – by permitting the governmental unit creditor to elevate its status over other similarly situated creditors by allowing it to unilaterally grant to itself a priority over other creditors; (3) violating the goal of efficiency by increasing the amount of litigation that will follow due to the uncertainty that will follow if the Court rules in favor of the FCC; and (4) subverting the policy of maximizing recovery for creditors and other interested parties by minimizing the value of the bankruptcy estate.

Second, should this Court hold that the FCC is not subject to Section 525(a) when it engages in any activity it deems "regulatory," the FCC and other governmental units will be compelled to engage in strategic behavior by maintaining inconsistent positions in various cases. This strategic behavior goes beyond the argument that governmental units will add a notion of regulatory purpose to the appropriate statutes or regulations so as to avoid the grasp of Section 525(a). Governments units will make strategic decisions and choices in which bankruptcy cases they should raise the notion of the

regulatory exemption and in which they should not. These case-by-case decisions will not be made on any principled, coherent, or consistent reading or application of the Bankruptcy Code; but rather on such factors as whether the debtor is in Chapter 7 or 11, whether the debtor is an individual or an entity, and the value of the license at the time of bankruptcy and later.

Third, the FCC is attempting to effectively exempt itself from the bankruptcy process – an attempt that should not be permitted and, if allowed, renders our bankruptcy laws irrelevant in cases involving regulatory matters.

ARGUMENT

The primary issue in this case is whether Section 525(a) of the Bankruptcy Code, 11 U.S.C. § 525(a), prohibits the Federal Communications Commission ("FCC") from unilaterally canceling the licenses it had previously sold at auction to NextWave. The briefs of counsel for NextWave and the other *amicus curiae* set forth in detail the statutory construction arguments in support of the view that Section 525(a) prohibits the FCC from canceling and reselling the licenses. Those arguments address the plain meaning of the statute, the legislative intent behind the statute (applying such interpretative aids as the legislative history and case law), and the historical basis of the statute itself.

This brief, therefore, respectfully brings to the Court's attention other perspectives on the issues presented including potential effects of Court's ruling on the issues.

I. APPLYING SECTION 525(a) OF THE BANKRUPTCY CODE TO ALLOW THE FCC TO CANCEL NEXTWAVE'S LICENSES IS INCONSISTENT WITH FUNDAMENTAL POLICIES OF BANKRUPTCY LAW

Bankruptcy law serves four commonly accepted goals. One goal is to provide corporate debtors with the ability to rehabilitate themselves and to provide individual debtors with a fresh start. The second goal is to treat similarly situated creditors equally. The third goal is for the bankruptcy process to be an efficient method for distribution of the debtor's assets to those entitled to recovery. The fourth goal is to allow a corporate reorganization to maximize recovery for all constituents,

including creditors and members of the larger community.[1] These various goals often overlap. For example some view the goal of equal treatment for similar creditors as not only fair, but efficient.[2] Further, the goal of maximization of recovery relates to efficiency as well. Standard definitions of efficiency identify wealth maximization as a fundamental tenet of efficiency.

A. The Policy of Debtor Rehabilitation

The idea of a "fresh start," which discharges an individual of his or her past debts, is well established in our bankruptcy system. *See, e.g., Local Loan Co. v. Hunt*, 292 U.S. 234, 244-45 (1934). Corporations and other non-individuals receive a discharge only if they reorganize.[2] The corporate reorganization and discharge is more appropriately referred to as

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[1]The four criteria used here are generally non-controversial. Yet in the past 15 years the debate over bankruptcy policy has mushroomed with far too many articles to mention here. For a sampling see the articles collected in "The Washington University Interdisciplinary Conference on Bankruptcy and Insolvency Theory" published in 72 Wash. U. L.Q. 1257 (1994). For a few more recent look at the debate *see* G. Eric Brunstad, *Bankruptcy and the Problems of Economic Futility: A Theory on the Unique Role of Bankruptcy Law*, 55 Bus. Law. 499 (2000)

[2]*See infra* Section I.C.

[2]Section 727(a)(1) of the Bankruptcy Code denies a discharge in a Chapter 7 liquidation cases to non-individual debtors. Section 1141(d) grants a discharge to a debtor which reorganizes under Chapter 11.

"debtor rehabilitation" rather than a "fresh start."[3] This Court has recognized the goal of debtor rehabilitation as a goal of Chapter 11. *National Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984); *see also United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204 (1983) (recognizing the congressional goal of encouraging reorganizations). The legislative history of the Bankruptcy Code refers to debtor rehabilitation as a primary reason for the reorganization provisions of Chapter 11. S. Rep. No. 95-589, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5795.

Some argue that the primary purpose of debtor rehabilitation is to provide the maximum recovery for the creditors. *See, e.g.*, Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. Chi. L. Rev. 815 (1987).[4] Others argue that debtor rehabilitation serves to protect a variety of interests: those of employees, the community (e.g., via contributions to a local tax base), future suppliers, and other groups that are not necessarily creditors. KAREN GROSS, FAILURE AND FORGIVENESS 205-31 (1997); Elizabeth Warren, *Bankruptcy Policy*, 54 U. Chi. L. Rev. 775 (1987). The legislative history supports the latter view by stating that one of the purposes of restructuring a debtor's finances in a Chapter 11 is to allow it to continue to operate and "provide its

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[3]A corporation that liquidates simply goes out of business. While the owners/shareholders may begin a new enterprise. The liquidating company, however, does not receive a discharge and therefore cannot continue in business since its new revenues would be subject to its old debts, making it impossible to begin a new business under the old bankrupt corporate form.

employees with jobs." H.R. Rep. No. 95-598, at 220 (1977) *reprinted in* 1978 U.S.C.C.A.N. 5963, 6179.

Many sections of the Bankruptcy Code work together to aid rehabilitation: e.g., the automatic stay, 11 U.S.C. § 362, the reorganization provisions of Chapter 11, and Section 525(a), at issue here, which prohibits a government that has issued a license to a debtor from canceling or revoking the license solely because the debtor owes a dischargeable debt to the issuing government.

Whether the purpose of debtor rehabilitation is primarily to serve creditors or is to serve broader interests as well, allowing the FCC to cancel the licenses violates either theory of the purpose of debtor rehabilitation. Without a reorganized debtor, NextWave's creditors will not be paid in full – as they would have been under the proposed plan. Nor will the interests of the other constituents, such as employees, the community, future suppliers, etc., be served. In addition, nothing will remain for the shareholders, as it would under the proposed plan.

B. The Policy of Equal Treatment for Similarly Situated Creditors

The second commonly accepted goal of the bankruptcy system is to assure equality among similarly situated creditors. Creditors with similar claims should be treated equally. This goal stems from the fact that if creditors are left to their state law remedies, creditors with identical sorts of claims (e.g. a typical firm's suppliers) will be treated quite differently. Outside of bankruptcy, creditors are left to their state law remedies to pursue the debtor and recover. As each creditor recovers it can foreclose or execute on the debtor's property. The state law system works so long as there are sufficient assets to satisfy the claims. But when the debtor does not have enough assets to satisfy all the claims the first creditors to "win the race to the court house" recover in full, while subsequent creditors recover

nothing. Under the state law system creditors with similar types of claims, such as general unsecured creditors, are treated very differently – some recover in full and some recover nothing. While it might seem appropriate to reward the diligent – those who pursue their claims quickly – the system is not so precise. Some creditors may draw a judge whose docket moves quickly, while other diligent creditors are assigned a judge whose docket moves more slowly. Other factors as well, such as timing of depositions, or other discovery, can effect the timing of the judgment and recovery.

When the debtor does not have enough funds to pay all its creditors, some creditors will recover in full and some will receive nothing. Bankruptcy evens out this disparity and makes the recovery of similarly situated creditors equal. Under the Bankruptcy Code, unsecured creditors share on a pro-rata basis. *See, e.g.*, Section 726(b). This goal is both fair and efficient. In *Begier v. I.R.S.*, 496 U.S. 53 (1990) this Court cited "equality of distributions" as a "central policy of the Bankruptcy Code. According to that policy creditors of equal priority receive pro rata shares of the debtor's property." *Id.* at 58.[5]

Whether the FCC is a secured creditor or an unsecured creditor, exempting the FCC from Section 525(a) sets a precedent reaching far beyond the facts of this case. It will apply to all cases involving governmental regulatory bodies which issue any sort of "license, permit, charter, franchise, or other similar grant" to an entity that later files a bankruptcy proceeding. Other governmental units can easily create regulatory purposes for the management of the licenses, permits

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[5]The result is fair: when there are insufficient assets to pay all creditors in full, creditors with similar claims receive equal treatment. Some argue that treating similarly situated creditors is also efficient. *See* Section I.C. *infra*.

and grants they issue. They then could claim they are exempt from Section 525(a) and are allowed to revoke or cancel the license, permit, or other grant when the debtor has failed to pay a dischargeable debt. They could revoke the license, resell it and collect on the new purchase price. These creditors could be paid in full should the value of the right be equal to or greater than the amount of the obligation owed.

In fact, under such a scenario the governmental agency could receive more than it is owed. That is precisely what the FCC hopes to achieve in this case due to the rising prices for FCC licenses. The debtor's other creditors, however would receive far less, if anything at all.

The governmental agency involved would also, in effect, create for itself a priority over the other creditors. The priority of unsecured claims is fixed by Congress in Section 507(a) of the Bankruptcy Code. Only two classes of priority are given by Section 507(a) to governmental agencies: the first is granted to federal, state and local taxing authorities for certain taxes, 11 U.S.C. § 507(a)(8); the second is granted to certain claims owed to "a Federal depository institutions regulatory agency by debtors. 11 U.S.C. § 508(a)(9). No priority has been granted to the FCC nor any other governmental unit. Not only has no priority been granted, Congress denied the FCC's request for just such a priority.[6]

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[6]As argued in the *Amicus Curiae* brief filed on behalf of the Official Committee of Unsecured Creditors of NextWave Personal Communications, Inc. and BFD Communications Partners, L.P., the FCC aggressively lobbied Congress for just such a priority and the appropriate Congressional Committees turned the agency down.

In fact, this *amicus curiae* testified on behalf of the American Bar Association before Congress on this issue with

Allowing a governmental agency to ignore Section 525(a) on the grounds that its actions are part of a regulatory scheme effectively circumvents the priority provision of the Bankruptcy Code. Congress established a system in the Bankruptcy Code that starts with the premise that all unsecured creditors are treated the same. Congress then provided for the payment of some select creditors ahead of others – child support payments, certain taxes, a limited amount of employee wage claims and others. No such priority has been statutorily given to the FCC. Absent an explicit grant of priority, governmental agencies must be treated equally with other similarly situated creditors. Exempting governmental creditors which claim that a regulatory purpose gives them a right to revoke, cancel, etc., their licenses effectively grants to them a priority not authorized by Congress. The FCC must be subject to Section 525(a) to assure the fair application of the bankruptcy laws.

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respect to a Resolution passed by the American Bar Association House of Delegates in August 1991 which (1) opposes any new priorities without appropriate notice and hearings and (2) opposes any new priorities absent compelling circumstances. *See* "Statement of Kathryn Heidt, Vice Chair of the Business Bankruptcy Committee of the Business Law Section of the ABA on behalf of the American Bar Association before the Subcommittee on Commercial Law and the Committee of the Judiciary of the U.S. House of Representatives Concerning Priorities for Federal Governmental Agencies Under the U.S. Bankruptcy Code" April 11, 2000.

C. Permitting the FCC to Cancel and Resell NextWave's Licenses Creates Inefficiencies in the Bankruptcy System

Bankruptcy is generally viewed as an efficient response to widespread default. Bankruptcy avoids duplication of costs. If creditors were forced to pursue the debtor in state court, each creditor would spend money on court costs, attorneys fees, and related costs. In addition, the debtor must use some of its limited assets to defend these suits – money that would otherwise be available for ultimate distribution to the creditors. Bankruptcy law mandates that all of the debtor's property becomes property of the estate, 11 U.S.C. § 541(a)(1), and if property is in the possession of someone other than the debtor it must be turned over. 11 U.S.C. § 542(a). All of the debtor's assets and all of the debtor's debts are brought into one proceeding.

Some view the policy previously discussed, treating similar creditors similarly, as efficient as well. They argue that if the creditors could bargain in advance regarding the distribution of assets among them when the debtor defaults, they would agree to share the debtor's available assets on a pro rata basis. The transaction costs of such advance bargaining would be enormous – thus advance bargaining could be inefficient. Bankruptcy law accomplishes the desired result for the creditors in an efficient manner. *See, e.g.*, THOMAS JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 15 (1986).

Should the Court rule in favor of the FCC the bankruptcy courts and district courts will be inundated with litigation requesting relief from Section 525(a) by governments, their agencies and units. As noted, governments will revise their statutes and regulations so as to provide a purported "regulatory purpose" to license revocations and other denials of government permits or grants. Each individual statute or regulation in each case will have to be judged on its own merits. While one might

think that a ruling by this Court allowing the FCC to cancel licenses would provide certainty in the law and thus lessen litigation on this issue, the opposite is the case. Greater certainty exists now. Since 1971, when this Court ruled that a government may not revoke a license for failure to pay a discharged debt in *Perez v. Campbell*, 402 U.S. 637 (1971), and the subsequent enactment of Section 525(a), the law has been certain and uniform on the issue of governmental grant revocations, cancellations, etc. In the 23 years since the current Bankruptcy Code has been in effect, only approximately 85 cases have raised this issue before the courts.[7]

D. Permitting the FCC to Cancel and Re-sell NextWave's Licenses Fails to Maximize the Bankruptcy Estate

One of the goals of bankruptcy law is to maximize the debtor's estate in order to obtain the highest recovery for creditors and perhaps also for other interested parties. Congress recognized that keeping the debtor intact and allowing it to continue in business may yield a better recovery than selling its parts piecemeal. H.R. Rep. 95-59 at 220 (1977), *reprinted at* 1978 U.S.C.C.A.N. 5963, 6179. Simply put, the going concern value often exceeds the liquidation value of a business. Congress hoped to capture that extra value for the debtor's constituents via the Chapter 11 process. This Court has recognized this goal in

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[7]A computer search was performed using one of the two standard legal research search engines. Results are on file with the author. A broad search of state and federal cases initially yielded 241 cases of which approximately 85 concerned a Section 525(a) issue in bankruptcy involving a government or agency.

several cases. *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 North LaSalle St. Partnership*, 526 U.S. 434, 453 (1999) (the Court recognized the policies underlying Chapter 11 – of preserving going concerns and "maximizing property available to satisfy creditors, . . ."). Likewise, in *Toibb v. Radloff*, 501 U.S. 157 (1991), the Court said that, among other possible goals, "Chapter 11 also embodies the general Code policy of maximizing the value of the estate." *Id.* at 163 (citing *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985)).

In order for NextWave to reorganize it needs the licenses purchased from the FCC. NextWave is willing to pay the full amount of the purchase price, along with interest and all incurred fees. It has proposed to do so in its plan of reorganization. Additional employees will be hired (some have been working throughout this proceeding), other interests will be served and the shareholders will retain their interests. NextWave's plan of reorganization proposes to pay its other creditors in full and for the shareholders to retain their interests.

One could argue that the better use of the licenses is to sell them to the subsequent purchaser, which proffered a higher bid at the re-auction than NextWave had bid at the original auction. This argument misses the point, however, that NextWave was the highest bidder at the auction at which these licenses were originally sold. The only intervening factor is NextWave's bankruptcy. The question is not whether a purchaser would now pay a higher price for the licenses. Rather the question is whether the FCC can re-sell the licenses in light of NextWave's bankruptcy. All creditors, including the FCC are bound by the Bankruptcy Code, including the provisions of Section 525.

Allowing the FCC to claim retroactively that the licenses were canceled and then to re-auction the licenses fails to maximize the estate. These licenses are crucial to NextWave's

reorganization – a reorganization that will pay the FCC and the other creditors in full, will expand its work force, benefit the community as well as potential customers, and allow the shareholders to potentially reap benefits from their investments.

A precedent allowing the FCC to unilaterally cancel and resell the licenses due to its purported regulatory purpose will open the gates for any governmental agency – federal, state, or local – to incorporate a regulatory purpose into its various licensing procedures. Upon bankruptcy these governmental units could revoke or cancel their licenses or similar grants. In effect, like the FCC in this case, they will attempt to cloak their action with the aura of "regulatory purpose" and thus claim that the obligation at issue is not a dischargeable debt. This, in turn, will cause potentially successful reorganizations to fail – minimizing the results for all concerned.

II. ALLOWING THE FCC AND OTHER GOVERNMENTAL AGENCIES TO CLAIM A REGULATORY EXCEPTION TO SECTION 525(a) WILL ENCOURAGE STRATEGIC BEHAVIOR NOT GROUNDED ON ANY PRINCIPLED OR COHERENT READING OF THE BANKRUPTCY CODE

Should this Court hold that the FCC is not subject to Section 525(a) when it engages in any activity with a "regulatory purpose," the FCC and other governmental units will be compelled to engage in strategic behavior by maintaining inconsistent positions in various cases

Holding that Section 525(a) does not apply to the FCC will also allow for strategic behavior on the government's part in future cases. This behavior will depend on the governmental unit's assessments of a number of facts including: a determination of the value of the license, permit, or other grant,

the amount of the obligation owed, whether the debtor is an individual or an entity, and whether the case is a proceeding under Chapter 11 or Chapter 7.

If the obligation owed for the license or similar grant was not secured, the government has an unsecured claim. If it was secured by a security interest in the license then the obligation is a secured claim for the lesser of the amount owed or the value of the license. 11 U.S.C. § 506(a). If the value of the license is less than the amount owed, the excess is an unsecured claim. *Id.*

If the obligation is unsecured or if the value of the license is below the amount owed, the government's strategy will be to sit back and go through the bankruptcy process. In a Chapter 7 or an 11 case, whether the debtor is an individual or a corporation the government will receive some distribution. If the government is unsecured it will receive its pro rata share of the distribution. If the agency has taken a security interest in the license, it will recover (1) the value of that license (the collateral) and (2) some portion of its unsecured claim as part of the pro rata distribution to unsecured creditors. Instead in either of these scenarios, if the governmental creditor were to argue it is not subject to Section 525(a), it will receive less. In the first example it will receive nothing since, in order to argue Section 525(a) does not apply it will have to argue that it does not have a "debt," which is defined as a "liability on a claim." 11 U.S.C. § 101(12). If the government unit is unsecured and is not owed a debt it will receive no distribution at all since only those with claims share in the bankruptcy distribution. 11 U.S.C. § 726(a). If the governmental unit is secured it may take its license but will receive only the value of the license and nothing on the remaining unsecured claim.

On the other hand, if either the license is worth more than the obligation or if the debtor is an individual it would be beneficial for the government to argue that Section 525(a) does not apply to it.

When the license is worth more than the obligation, the government would claim it is not subject the Section 525(a) and would simply cancel the license, sell it and keep the excess received over the amount of the debt owed. This is precisely what the FCC has attempted in this case.[8] However, as a secured creditor, the FCC should only be entitled to the value of the license or the amount owed, *whichever is less*. 11 U.S.C. §§ 506(a), 1129(b)(1)(A). Instead, the FCC argues that it may cancel the licenses, resell them and keep the excess despite the law of secured credit. A secured creditor may not keep money received beyond the amount owed plus interest and costs of recovery. U.C.C. § 9-608.

If the debtor is an individual the governmental agency will have to assess the individual's likely future earnings. Since the obligation is not a dischargeable debt it, of course, it will not be discharged. Unlike a corporation, however, the individual goes on to lead a (hopefully) productive life after discharge. If the future looks promising the governmental unit may want to argue

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[8]After the auction at which NextWave purchased its licenses, the value of the licenses fell substantially below the purchase price bid by NextWave due to the auction by the FCC of additional blocks of licenses for personal service communications. When the value of the licenses fell below the amount owed, the FCC would have been partially unsecured. The bankruptcy court found that the licenses were worth approximately $1.02 billion as of February 19, 1997. The decision in the various *NextWave* cases are consistent that the value of the licenses purchased by NextWave had fallen well below the price bid. *See, e.g., NextWave, Inc. v. FCC*, 254 F.3d 130, 136 (2001) referring to *NextWave IV*, 235 B.R. 263, 305 (Bankr. S.D.N.Y. 1998). The value of the licenses later increased beyond the purchase price.

that the obligation is not a dischargeable debt and pursue the debtor post bankruptcy. Conversely, if the potential for future earnings look grim, the government would be better off to fail to raise the Section 525(a) issue and share in the bankruptcy distribution.

Exempting the FCC and other governmental units from Section 525(a) when it engages in any activity it deems "regulatory," will result in the FCC and other governmental units engaging in strategic behavior by maintaining inconsistent positions in similar cases.

III. THE FCC IS ATTEMPTING TO OPT OUT OF THE BANKRUPTCY PROCESS

The FCC is essentially trying to create for itself an election to opt out of the bankruptcy process on a case by case basis. In order to exempt itself from Section 525(a) it argues that NextWave's obligation is not a dischargeable debt. It has further argued that it is not subject to the provisions of Chapter 11 that allow a debtor to cure and reinstate a default as part of its Chapter 11 plan of reorganization.

Other governmental creditors, long before the FCC, have asserted that obligations owed to them were not "debts" within the meaning of the Bankruptcy Code and therefore were not dischargeable. Most notably the State of Ohio in *Ohio v. Kovacs*, 469 U.S. 274 (1985) asserted that an obligation of an individual debtor to clean up a contaminated cite was not a "claim" or "debt." Since the obligation would not be discharged the State could pursue the individual debtor after his Chapter 7 proceeding concluded. Indeed, the State in the *Kovacs* case had a stronger case than does NextWave that the obligation was not

a "claim" and therefore not a "debt."[9] The obligation in *Kovacs* was an injunction ordering Mr. Kovacs to perform the clean-up. Specifically:

> The state of Ohio had ordered the individual debtor to clean up a site contaminated by the debtor and his corporation. When the debtor failed to perform the cleanup, Ohio pursued a remedy under a general state statute that gave a court discretion to appoint a receiver to carry out a judgment. The appointed receiver took control of the debtor's assets. The debtor was dispossessed of the property and was therefore unable to carry out the cleanup himself. Because the debtor could no longer carry out the cleanup, he could only pay money to defray cleanup costs. Therefore, the Court held that by the state's appointment of a receiver, the order had been effectively transformed into an obligation to pay money. *Id.* at 283-284. The Court was careful to say that it was not deciding what the result would have been had the receiver not actually been appointed. *Id.* at 284.

KATHRYN R. HEIDT, ENVIRONMENTAL OBLIGATIONS IN BANKRUPTCY at ¶ 3.03[c][ii] (1993).

In this case NextWave's obligation falls within the first definition of "claim" and a "right to payment. 11 U.S.C. § 101(5)(a) and is more easily categorized as a "claim" and therefore a "debt." 11 U.S.C. § 101(12).

In this case the FCC makes the same argument in the context of 525(a). It follows that if the FCC is successful in its argument that it does not have a "claim" or a "debt" then it is not subject to the bankruptcy process at all.

The difficulty with the FCC's argument can be seen in the discussion of a governmental unit's strategic behavior discussed earlier. Assume for a moment that this were a Chapter 7 liquidation and that the value of the licenses remained as depressed as they were at the time of the bankruptcy filing. According to the bankruptcy court the licenses were worth about $1.02 billion at the time the FCC conveyed them to NextWave – far less than the $4.74 billion bid. *NextWave IV*, 235 B.R. 305 (1998), *aff'd*, 241 B.R. 311, 321 (S.D.N.Y. 1999), *rev'd on other grounds* 200 F.3d 43 (2d Cir. 1999). In a Chapter 7 proceeding only those who hold "claims" share in the distribution, 11 U.S.C. §§ 726(a)(1)-(a)(4). In a Chapter 11 proceeding only those with claims may vote on the plan of reorganization. 11 U.S.C. § 1126(a). If, as the FCC asserts, the obligation is not a claim or debt then it will not share in the distribution of the debtor's assets in a Chapter 7 proceeding and, since a Chapter 7 corporate debtor does not continue in business

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[9]The obligation in *Kovacs* did not fall within the first definition of "claim" in Section since it was not a "right to payment," nor did the statute contain an alternate right to payment in lieu of cleanup. Rather the Court had to decide whether it fell into the more difficult definition of "claim" under Section 101(5)(B), which defines claim as a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, ..." Despite the more stringent standard the Court nonetheless held that the cleanup obligation was a "claim" and therefore a "debt" that was dischargeable in bankruptcy.

the FCC would not recover at all.[10] In a Chapter 11 proceeding it loses the rights to vote as well as other protections.[11]

CONCLUSION

The Court of Appeals decision is consistent with bankruptcy policy, will prevent opportunistic behavior and assures that governmental agencies may not opt out of bankruptcy proceedings simply because their actions are regulatory in nature.

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[10]Justice O'Connor first recognized the potential "adverse consequences" in a case involving a government attempting to pursue a Chapter 7 corporation when no assets would remain. *Ohio v. Kovacs*, 469 U.S. 274, 286 (1985).

[11]The provisions regarding classification of claims, treatment of those classes and the minimum amounts that must be afforded claim holders include 11 U.S.C. §§ 1123(a)(i), (a)(3), 1129(a)(7) and 1129(b).

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

June 13, 2002

Kathryn R. Heidt, Esq.
Professor of Law
723 Hastings Street
Pittsburgh, PA 15206

Re: FCC v. Nextwave Personal Communications, Inc., et al.
No. 01-653

Dear Ms. Heidt:

As requested in your letter of June 12, 2002, I hereby consent to the filing of an amicus curiae brief in the above-captioned case.

Due to the delay in receiving incoming mail, in addition to mailing your brief via first-class mail, we would appreciate a fax of your brief. If that is acceptable to you, please fax your brief to Emily C. Spadoni, Supervisor Case Management, Office of the Solicitor General, at (202) 514-8844. Ms. Spadoni's direct dial phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

Sincerely,

Paul D. Clement /s

Paul D. Clement
Acting Solicitor General

06/18/02 16:02 FAX 002

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June 18, 2002

William K. Suter, Clerk
United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543

Re: Blanket Consent for Amici Curiae Briefs
Federal Communications Commission v. NextWave Personal Communications, Inc., et al., Docket No. 01-653
Arctic Slope Regional Corp., et al., v. NextWave Personal Communications, Inc., et al., Docket No. 01-657

Dear Mr. Suter:

Respondents NextWave Personal Communications Inc. and NextWave Power Partners Inc., by their undersigned attorney, hereby grant a blanket consent for the filing of all amici curiae briefs in the above-captioned cases.

Please let me know if you need any additional information.

Sincerely,

Donald B. Verrilli, Jr.
Counsel for Respondents

cc: Paul Clement
Jonathan Franklin

U.S. Department of Justice

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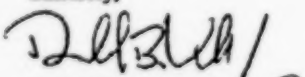

Donald B. Verrilli, Jr.
Counsel for Respondents

cc: Paul Clement
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